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No. 81-22

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANDREW C. NEIDINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The question presented in this criminal tax case is whether the district court properly modified a portion of petitioner's sentence from incarceration for 30 days in a detention center to 60 days in a half-way house.

The pertinent facts may be summarized as follows: On May 8, 1980, in the United States District Court for the District of Maryland, petitioner pled guilty to one count of willfully failing to file an income tax return for the year 1974 in violation of 26 U.S.C. 7203.[1] On July 3, 1980, petitioner was sentenced in

[1] Petitioner originally was charged with two counts of willful failure to file, but the second count was dismissed pursuant to the plea agreement.

accordance with the court's split-sentencing authority, 18 U.S.C. 3651,[2] for "one year, on the condition that the Defendant be confined in a jail-type institution on work release in a Montgomery County Detention Center for a period of 30 days. Execution of [the] balance of the sentence of imprisonment is suspended. The Defendant is placed on probation for a period of two years * * *" (J.A. 17-18).[3] As conditions of probation, petitioner was required to pay a fine, perform eleemosynary service, repay his past due taxes and not violate any laws (J.A. 18).[4]

At the time of sentencing the district court also noted that "as far as the period of time on work

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[2] The relevant portion of Section 3651 reads as follows:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

[3] "J.A." refers to the joint appendix filed in the court of appeals.

[4] In the written Judgment and Probation/Commitment Order that was prepared after the sentencing, the probationary period was described as follows: "Defendant is placed on Probation for the period of Two (2) Years, to commence upon Defendant's release from confinement * * *" (J.A. 28).

release is concerned that will depend upon the availability of a space in the Montgomery County Detention Center, among other things" (J.A. 18). After the July 3 hearing and before petitioner submitted himself to the custody of the detention center, the district court was informed that the Montgomery County Detention Center would not accept any inmate for a period of less than 60 days (Pet. 5).

The district court held a second sentencing hearing on July 16, 1980. The court informed petitioner of the problem and explained that it believed it was appropriate to sentence petitioner either to 30 days in a regular jail or 60 days in the Montgomery County Pre-Release Center, which is a half-way house (J.A. 24). The court sentenced petitioner as follows (J.A. 24-25):

> [O]ne year as to Count 1. Execution of the sentence of imprisonment is hereby suspended, and the Defendant is placed on probation for a period of two years from this date on the usual conditions of probation and * * * [t]hat he reside in the Montgomery County Pre-Release Center on work release for a period of 60 days * * *.

2. Petitioner appealed the modification of his sentence, and the court of appeals affirmed (Pet. App. 1a-4a). First, it held (Pet. App. 2a-3a) that the sentence did not violate the Double Jeopardy Clause of the Fifth Amendment because its protections do not attach until service of the sentence begins, citing *United States* v. *Bynoe*, 562 F.2d 126 (1st Cir. 1977); *Acme Poultry Corp.* v. *United States*, 146 F.2d 738 (4th Cir. 1944), cert. denied, 324 U.S. 860 (1945), and petitioner's sentence had not begun prior to the second sentencing hearing. Second, it found

(Pet. App. 3a-4a) that the sentence as modified was a permissible sentence for a violation 26 U.S.C. 7203 and that the district court had exercised appropriate discretion in sentencing petitioner. The court denied a petition for rehearing (Pet. App. 5a).[5]

3. Petitioner asserts (Pet. 6) that the district court in its oral sentence stated that "probation starts immediately," and therefore his sentence already had begun when the court "increased" it on July 16. Petitioner contends that the court of appeals avoided holding the resentencing to be double jeopardy by relying upon the written order. Petitioner concludes (Pet. 7-10) that this use of the written order to modify the oral sentence conflicts with numerous court of appeals decisions and therefore warrants review by this Court.[6]

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[5] Petitioner took issue with a statement in the original opinion (Pet. App. 1a-4a) that he had been shown a copy of the written order at the time of sentencing. The court reissued the opinion (Pet. App. 7a-9a) excising the contested sentence and replacing it with the statement that the written order should be referred to in order to resolve any ambiguities in the oral pronouncement of sentence (Pet. App. 8a). As appears more fully below, there was no ambiguity in the oral sentence in this case and therefore reliance on the written judgment was unnecessary.

[6] Petitioner's argument is constructed on the premise that the Double Jeopardy Clause bars any increase in a sentence once service (even a period of probation) has commenced. This premise is questionable in light of *United States* v. *DiFrancesco*, No. 79-567 (Dec. 9, 1980). See also *United States* v. *Busic*, 624 F.2d 1091 (3d Cir.), cert. denied, No. 80-5363 (Nov. 3, 1980). Since, as explained in the text, petitioner had not in fact commenced serving his sentence at the time it was altered, there is no need for this Court to consider what his rights would have been if he had.

Petitioner's argument is based wholly on a misinterpretation of the record. The statement that petitioner relies upon (Pet. 6), regarding when probation was to begin, was made at the end of the second sentencing hearing (J.A. 27). At the first sentencing hearing, the district court did not specify when the probation period was to begin. It simply placed him on probation for two years as part of the split sentence under 18 U.S.C. 3651. There is no factual basis for petitioner's claim and, thus, cases relied upon by petitioner dealing with discrepancies between the oral and written pronouncement of sentence are inapposite.

Nor was there ambiguity in the imposition of the first sentence. Because the probation under Section 3651 is imposed only after the suspension of the sentence, it is naturally assumed that, absent something to the contrary, the probationary period commences at the end of the incarceration. See *United States* v. *Clayton*, 588 F.2d 1288, 1291 (9th Cir. 1979); *Gaddis* v. *United States*, 280 F.2d 334, 336 (6th Cir. 1960). The written order specifying probation after incarceration reconfirmed the statement of the district court, which in context was unambiguous.

4. Petitioner's second argument (Pet. 10-12) is that the decision of the court of appeals that probation did not commence at the time of sentencing conflicts with decisions of other courts of appeals. Those cases are, however, distinguishable. In *Sanford* v. *King*, 136 F.2d 106, 108 (5th Cir. 1943), the court held that "the intention of the Court imposing sentence" is the "controlling consideration" and that the most reasonable interpretation of the sentencing judge's oral pronouncement in that case was that probation should begin immediately. In the instant case

all indications were that the probation should commence at the end of the 30-day work-release detention.

In *United States* v. *Rosenstreich*, 204 F.2d 321 (2d Cir. 1953), the sentence was a fine followed by probation. The defendant paid the fine immediately and the issue was whether probation began then or when the defendant submitted to the technical custody of the probation authorities. That issue is not posed in this case because petitioner never fulfilled the preconditions to his probation.[7]

The court of appeals properly concluded that petitioner's probation did not begin prior to the second sentencing hearing and therefore the modification of the sentence was permissible. The decision does not conflict with any decision of any other court and therefore does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[7] Petitioner also cites *Gaddis* v. *United States*, 280 F.2d 334, 336 (6th Cir. 1960). The court did make the statement quoted by petitioner (Pet. 11) to the effect that probation began immediately, but it did so in the context of deciding whether a written order that a sentence was consecutive was controlling over an oral pronouncement which did not specify concurrent or consecutive terms. Thus this dictum, which relied upon *United States* v. *Rosenstreich*, *supra*, and *Sanford* v. *King*, *supra*, added nothing to those prior decisions.

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